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RAILROADS — LIABILITY FOR DAMAGE TO ANIMALS — CATTLE RUNNING AT LARGE. — The plaintiff's horse was killed by one of the defendant's trains in a district where cattle might lawfully run at large. The jury found that the train was operated negligently, and that cattle were reasonably to be expected upon the unenclosed right of way. *Held*, that the plaintiff may recover. *Houston, etc. R. Co. v. Garrett*, 160 S. W. 111 (Tex.).

Many states in the South and West have held inapplicable to their conditions the common-law rule which required the owner of cattle to keep them at his peril from trespassing upon the land of another. *Wagner v. Bissell*, 3 Ia. 396; *Pace v. Potter*, 85 Tex. 473, 22 S. W. 300. See INGHAM, LAW OF ANIMALS, 265 *et seq.* In these jurisdictions, in the absence of local regulations, the owner of cattle is not liable for their trespasses on unenclosed lands. *Morris v. Fraker*, 5 Colo. 425. But it is well settled that cattle have no affirmative right to graze upon such lands. *Harrison v. Adamson*, 76 Ia. 337, 41 N. W. 34. It is also generally agreed, contrary to the assumption of the principal case, that although their owner is relieved from liability, the cattle are still trespassers for purposes of determining the landowner's obligations. *Beinhorn v. Griswold*, 27 Mont. 79, 69 Pac. 557; *Corbett v. Great Northern Ry. Co.*, 19 N. D. 450, 125 N. W. 1054. *Cf. Hurd v. Lacy*, 93 Ala. 427, 428, 9 So. 378. The landowner, therefore, is not bound to keep his premises in safe condition for cattle running at large. *Herold v. Meyers*, 20 Ia. 378; *Hughes v. Hannibal, etc. R. Co.*, 66 Mo. 325. But even to trespassing animals the landowner owes a duty not to inflict intentional harm. *Campbell v. Great Western Ry. Co.*, 15 U. C. Q. B. 498. He owes a further duty to exercise reasonable care to avoid active injury to them after their presence is discovered. *Herrick v. Wixom*, 121 Mich. 384, 81 N. W. 333. *Contra, Maynard v. Boston & Maine R. Co.*, 115 Mass. 458. Many courts extend this duty to situations where the presence of trespassers is reasonably to be anticipated. *Bullard v. Southern Ry. Co.*, 116 Ga. 644, 43 S. E. 39; *Whelan v. Baltimore & Ohio R. Co.*, 70 W. Va. 442, 74 S. E. 410. For the same reasons of policy that dictated the repudiation of the common-law rule of liability for trespassing animals, this latter view is peculiarly suitable in states devoted to grazing, and its application to the facts of the principal case would justify the decision even though the animal was trespassing.

SALES — ESSENTIAL ELEMENTS OF SALE — MUTUUM: WHETHER A SALE WITHIN LOCAL OPTION LAWS. — The defendant was convicted of selling liquor in prohibition territory. The alleged purchaser secured a quart of whiskey from him which he later repaid by returning a like quantity. *Held*, that the judgment be affirmed. *Veach v. State*, 159 S. W. 1069 (Tex. Crim. App.).

The transaction in the principal case is a *mutuum*, the exchange of one chattel for another of similar nature. It is not a bailment, for under the common-law view the transferee acquires title when his obligation is not to return the specific thing but one like it. *South Australian Ins. Co. v. Randell*, 6 Moore's P. C. N. S. 341; see *Foster v. Pettibone*, 7 N. Y. 433, 435. It is true that a bailment can be created without a right to regain the specific article, provided some continuous right *in rem* is retained, as where grain is mingled in a common mass in a warehouse. *Ledyard v. Hibbard*, 48 Mich. 421. But in the principal case the defendant transferred the whiskey outright and retained no such right *in rem*. Granting, then, that there was a transfer of property by the defendant, the question remains whether it was a sale within a statute providing punishment for "whoever shall sell intoxicating liquor." TEXAS PENAL CODE, Art. 402. Such has been held a sale in Massachusetts. *Howard v. Harris*, 8 Allen (Mass.) 297. A later civil statute in Texas making it illegal to "sell, exchange, or give away" liquor in dry territory supports the above interpretation of the criminal statute. SAYLE'S TEXAS CIVIL STATUTES, Art. 3396. Barter is likewise held a sale within the Statute of Frauds. *Franklin v. Matoa Gold Min.*